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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 STEVE SHAPIRO and STEVE SHAPIRO
13 MUSIC,

14 Plaintiffs,

15 v.

16 JUPITERIMAGES CORPORATION,

17 Defendant.

CASE NO. 3:07-CV-5540 PJH

JUPITERIMAGES CORPORATION'S NOTICE
OF MOTION AND MOTION TO DISMISS
THE COMPLAINT OR, IN THE
ALTERNATIVE, FOR A STAY;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF

Date: December 12, 2007

Time: 9:00 a.m.

Place: Courtroom 3

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Jeffer Mangels
Butler & Marmaro LLP

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2
3 PLEASE TAKE NOTICE THAT on December 12, 2007 at 9:00 a.m., or as soon
4 thereafter as the matter may be heard, in Courtroom 3 of the above-captioned Court, located at 450
5 Golden Gate Avenue, San Francisco, CA 94102, before the Hon. Phyllis J. Hamilton, United States
6 District Court Judge, defendant Jupiterimages Corporation will and hereby does move this Court for
7 an order dismissing Plaintiff Steve Shapiro's¹ ("Shapiro") Complaint or, in the alternative, to stay
8 this action.

9 This motion is made on two grounds.

10 First, Shapiro's Complaint, which seeks declaratory relief, fails to state a claim for
11 relief. The Complaint provides no facts showing that Shapiro is entitled to relief. Shapiro asserts
12 only that he had a contract with Jupiterimages and he is entitled to declaratory relief regarding a
13 dispute about indemnity. Shapiro does not state the nature of the indemnity dispute. Shapiro does
14 not state any facts regarding why he is entitled to prevail. Shapiro does not even state what
15 declaration he is seeking. Accordingly, under the recent United States Supreme Court pleading case
16 of Bell Atlantic Corp. v. Twombly, - U.S. -, 127 S.Ct. 1955, 1964-65, - L.Ed.2d - (2007), the
17 Complaint fails to state a claim.

18 Second, this Court should exercise its discretion to dismiss the declaratory relief
19 claim in light of Jupiterimages's Connecticut federal court Complaint against Shapiro. The
20 Complaint in this Court, containing one claim for declaratory relief, deals solely with Shapiro's
21 contractual obligation in the Asset Purchase Agreement ("Agreement") to indemnify Jupiterimages.
22 In contrast, Jupiterimages's Connecticut federal court Complaint deals with all the issues in dispute
23 between the parties, e.g., claims for fraud, negligent misrepresentation, innocent misrepresentation,
24 breach of contract (including breach of the indemnity obligation in the parties' Agreement),
25 violation of the UCC, unfair trade practices and rescission.

26 Declaratory relief is inappropriate because: (a) the declaratory relief Complaint will

27
28 ¹ Steve Shapiro does business as Steve Shapiro Music.

1 not resolve all the disputes between the parties and there is another lawsuit in another Court that
2 will provide complete relief between the same parties; (b) the declaratory relief Complaint seeks to
3 defeat liability in a subsequent suit for coercive relief, i.e., damages, which is an improper use of
4 declaratory relief; and (c) the declaratory relief Complaint was filed in a stated attempt to obtain a
5 more favorable forum or procedural posture for Jupiterimages's anticipated lawsuit against Shapiro,
6 which is also an improper use of declaratory relief. In the alternative, this Court should stay this
7 action until the Connecticut federal court lawsuit between the parties has been resolved.

8 This Motion is made, and based, upon this Notice of Motion and Motion, the
9 Memorandum of Points and Authorities attached hereto, the Request for Judicial Notice, all matters
10 and facts upon which the Court can take judicial notice, and upon such additional oral or written
11 evidence as may be properly presented to this Court at or prior to the hearing of the Motion.

12 DATED: November 6, 2007

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14 By: /S/ JEFFREY K. RIFFER

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

STEVE SHAPIRO and STEVE SHAPIRO
MUSIC,

Plaintiffs,

v.

JUPITERIMAGES CORPORATION,

Defendant.

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JUPITERIMAGES CORPORATION'S
MEMORANDUM OF POINTS AND
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I.

INTRODUCTION

Steve Shapiro ("Shapiro")² made a written representation that he was the sole owner of certain musical tracks. Based on that written representation, Jupiterimages Corporation ("Jupiterimages") purchased the tracks from Shapiro.

Shapiro's written representation was untrue. Shapiro was not the sole owner of certain tracks. Indeed, he had no ownership rights at all to such tracks.

After Jupiterimages purchased the tracks, it licensed them to others. Then, the real owners of the tracks started surfacing. They demanded compensation.

Jupiterimages informed Shapiro that he had to indemnify Jupiterimages, as required by the parties' Asset Purchase Agreement ("Agreement").

Shapiro filed a check-the-boxes Complaint containing one claim for declaratory relief. The Complaint seeks declaratory relief regarding Shapiro's indemnity obligation under the Agreement.³

The Complaint should be dismissed for two major independent reasons.

First, the Complaint provides no facts showing that Shapiro is entitled to relief. Shapiro asserts only that he had a contract with Jupiterimages and he is entitled to declaratory relief regarding a dispute about indemnity. Shapiro does not state the nature of the indemnity dispute. Shapiro does not state any facts regarding why he is entitled to prevail. Shapiro does not even state what declaration he is seeking. Accordingly, under the recent United States Supreme Court pleading case of Bell Atlantic Corp. v. Twombly, - U.S. -, 127 S.Ct. 1955, 1964-65, - L.Ed.2d - (2007), the Complaint fails to state a claim.

Second, the Complaint should be dismissed because it makes no sense to have two federal court lawsuits involving the same parties and Shapiro's declaratory relief Complaint in this

² Shapiro does business as Steve Shapiro Music.

³ The Complaint was filed in state court and removed to this Court.

1 Court is an improper use of declaratory relief in three ways:

2 (a) It is improper to use declaratory relief to resolve a sliver of the dispute
3 between the parties where there is another pending lawsuit that involves all of the disputed issues
4 between the parties. Jupiterimages's Connecticut federal court Complaint against Shapiro deals
5 with all of the disputed issues between the parties, viz., Jupiterimages's claims against Shapiro for
6 fraud, negligent misrepresentation, innocent misrepresentation, breach of the indemnity provision in
7 the Agreement, other breaches of contract, violation of the UCC, unfair trade practices and
8 rescission.⁴ See Request for Judicial Notice.

9 (b) It is improper for one party (Shapiro) to seek declaratory relief of no liability
10 where there is a pending federal lawsuit against that party for coercive relief, i.e., damages, as a
11 result of such liability.

12 (c) It is improper to use declaratory relief where such complaint was filed in
13 anticipation of another lawsuit for damages and to obtain a more favorable forum.

14 II.

15 SHAPIRO'S COMPLAINT FOR DECLARATORY RELIEF SHOULD BE DISMISSED 16 FOR FAILURE TO STATE A CLAIM 17

18
19 A cause of action can fail to state a "claim upon which relief can be granted" under
20 Fed.R.Civ.P. 12(b)(6) if it fails to comply with the pleading requirements of Rule 8(a)(2). See, e.g.,
21 Evancho v. Fisher, 423 F.3d 347, 355 (3rd Cir. 2005); 5 Wright & Miller, Federal Practice &
22 Procedure § 1203 at p.99 (3d ed. 2004) ("the form and sufficiency of a statement of a claim for
23 relief under Rule 8(a)(2) may be tested by a motion to dismiss for failure to state a claim upon
24 which relief can be granted, Rule 12(b)(6)").

25 The Federal Rules require "a short and plain statement of the claim showing that the
26 pleader is entitled to relief." See Fed. R. Civ. P. 8(a)(2).

27 ⁴ Both cases were just filed. No discovery has occurred in either case. This is the first
28 motion in either case.

1 The United States Supreme Court, in a landmark pleading case decided just a few
 2 months ago, made clear that a plaintiff is obligated to provide "more than labels and conclusions,
 3 and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v.
 4 Twombly, - U.S. -, 127 S.Ct. 1955, 1964-65, - L.Ed.2d - (2007); see generally Papasan v. Allain,
 5 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts "are not
 6 bound to accept as true a legal conclusion couched as a factual allegation").

7 "Factual allegations must be enough to raise a right to relief above the speculative
 8 level." Twombly, 127 S.Ct. at 1965. "Rule 8(a)(2) still requires a showing, rather than a blanket
 9 assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see
 10 how a claimant could satisfy the requirement of providing not only fair notice of the nature of the
 11 claim, but also grounds on which the claim rests." Id. at 1965 n. 3 (internal quotation marks
 12 omitted).

13 When a Complaint contains inadequate factual allegations, "this basic deficiency
 14 should ... be exposed at the point of minimum expenditure of time and money by the parties and the
 15 court." Id. at 1966. "[A] district court must retain the power to insist upon some specificity in
 16 pleading before allowing a potentially massive factual controversy to proceed." Id. at 1967.

17 Other courts have also granted Rule 12(b)(6) motions to dismiss complaints for
 18 failure to plead any meaningful facts under the new Twombly standard. See Dell, Inc. v. This Old
 19 Store, 2007 WL 1958609 *3 (S.D. Tex. 2007); Aktieselskabet AF 21 v. Fame Jeans, Inc., 2007 WL
 20 1655877 *15 (D.D.C. 2007) .

21 Shapiro's check-the-boxes Complaint for declaratory relief pleads no facts entitling
 22 him to relief in his dispute with Jupiterimages. Shapiro asserts only that he had a contract with
 23 Jupiterimages and he is entitled to declaratory relief regarding a dispute regarding indemnity.

24 Shapiro does not state the nature of the indemnity dispute. Shapiro does not state
 25 any facts regarding why he is entitled to prevail. Shapiro does not even state what declaration he is
 26 seeking.

27 Shapiro's Complaint is defective under the United States Supreme Court's Twombly
 28

1 decision.⁵ It should be dismissed for failure to state a claim.

2
3 III.

4 SHAPIRO'S COMPLAINT FOR DECLARATORY RELIEF SHOULD BE DISMISSED
5 (OR STAYED)
6

7 The Declaratory Judgment Act provides that "any court of the United States ... *may*
8 declare the rights and other legal relations of any interested party seeking such declaration." 28
9 U.S.C. § 2201(a) (emphasis added).

10 The language is discretionary, not mandatory.

11 "[D]istrict courts possess discretion in determining whether and when to entertain an
12 action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter
13 jurisdictional prerequisites." Wilton v. Seven Falls Co., 515 U.S. 277, 282, 115 S.Ct. 2137, 2140,
14 132 L.Ed.2d 214 (1995).

15 "In the declaratory judgment context, the normal principle that federal courts should
16 adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial
17 administration." Id., 515 U.S. at 288, 115 S.Ct. at 2143.

18 "A declaratory judgment should issue only when it will serve a useful purpose."
19 International Harvester Co. v. Deere & Co., 623 F.2d 1207, 1218 (7th Cir. 1980); Exxon Shipping
20 Co. v. Airport Depot Diner, Inc., 120 F.3d 166, 169 (9th Cir. 1997) ("it is an accepted principle that
21 no declaration should be made, unless its serve a useful, practical purpose").

22 There are three independent reasons why Shapiro's Complaint, containing one claim
23 for declaratory relief, should be dismissed.

24 ///

25 _____
26 ⁵ It is deficient under California law as well. See Code of Civil Procedure § 425.10(a) ("A
27 complaint ... shall contain both of the following: (1) A statement of the facts constituting the cause
28 of action, in ordinary and concise language. (2) A demand for judgment for the relief to which the
pleader claims to be entitled."); Burke v. Superior Court, 71 Cal.2d 276, 279 n.4 (1969) (complaint
must plead ultimate facts, not merely legal conclusions).

1. "Declaratory judgment actions should not be used 'to try a controversy by piecemeal, or to try particular issues without settling the entire controversy.'" First Nationwide Mortgage Corp. v. FISFI Madison, LLC, 219 F.Supp.2d 669, 674 (D. Md. 2002).

The federal courts have dismissed declaratory relief complaints involving one discrete issue where the parties to that declaratory relief complaint were involved in another federal court case where many other damage claims between the parties were being litigated (even where the declaratory relief lawsuit was filed first). See, e.g., First Nationwide Mortgage Corp. v. FISFI Madison, LLC, 219 F.Supp.2d 669, 674 (D. Md. 2002) (dismissed declaratory relief lawsuit); Koch Engineering Co., Inc. v. Monsanto Co., 621 F.Supp. 1204, 1207 (E.D. Mo. 1985) (dismissed declaratory relief lawsuit); Centennial Life Ins Co. v. Poston, 88 F.3d 255, 258 (4th Cir. 1996) (dismissed declaratory relief lawsuit); Rowan Companies, Inc. v. Blanton, 764 F.Supp. 1090, 1092 (E.D. La. 1991) ("The purpose of [a declaratory judgment] is not served by trying a case piecemeal."; dismissed declaratory relief lawsuit); Twin City Fed. S&L Ass'n v. Gelhar, 525 F.Supp. 802, 804 (D. Minn. 1981) ("Declaratory relief should be refused where it will not result in a more just and expeditious resolution of the entire controversy between the parties."; dismissed declaratory relief lawsuit).

Koch Engineering Co., Inc. v. Monsanto Co., 621 F.Supp. 1204 (E.D. Mo. 1985) is directly on point. In Koch, a supplier brought a declaratory judgment action in Missouri federal court to determine rights of the supplier and a purchaser under their contract. Shortly thereafter, the purchaser sued the supplier for damages on multiple claims in Texas federal court. The Missouri federal court granted the motion to dismiss the declaratory relief Complaint. It noted:

"[I]t is important to note that the two actions are not identical. [Plaintiff's] action in this [federal] Court seeks a declaration of the parties' rights under the contract. Monsanto's action, filed in the Southern District of Texas, seeks damages for breach of contract, breach of warranty, negligence and a violation of the Texas Deceptive Trade Practices Act. Had it not been for the Declaratory Judgment Act, [Plaintiff] could not have filed this or any other lawsuit. It is this use of the Act, to which this Court objects. [Plaintiff's] suit, while furthering none of the goals of the Declaratory Judgment Act, represents only a race to the courthouse. This type of

1 procedural fencing denies the injured party his right to choose the forum in which to seek redress."
2 Koch., 621 F.Supp. at 1207.

3 "This Court must also consider which of the two actions will best serve the
4 needs of the parties by providing a comprehensive solution to the entire controversy.... [I]t is quite
5 obvious to this Court even at this early stage in the proceedings that Monsanto's suit in the Southern
6 District of Texas will fully resolve the controversy between the parties. By dismissing [Plaintiff's]
7 petition for declaratory judgment, this Court avoids ... the burden and expense on the courts and the
8 parties associated with duplicate lawsuits." Id., 621 F.Supp. at 1208.

9 Similarly, in First Nationwide Mortgage Corp. v. FISFI Madison, LLC, 219
10 F.Supp.2d 669, 674 (D. Md. 2002), a mortgage company brought a declaratory relief action against
11 a financial marketing company in Maryland state court and, after removal, the marketing company
12 filed its own breach of contract claim against mortgage company in Tennessee federal court. The
13 Maryland federal court dismissed the Complaint, containing one claim for declaratory relief,
14 because a Tennessee federal court lawsuit involved all the disputes between the parties.

15 "The lawsuit ... in ... Tennessee provides a broader and more comprehensive
16 forum for resolving the entire dispute between the parties. For example, were this Court to grant the
17 requested [declaratory] relief, this action would still fail to address [the other party's other damage]
18 claim.... In contrast, the litigation in Tennessee would encompass all issues, including the
19 affirmative defense presented by [this declaratory claim] in this action.... Accordingly, this Court
20 finds that judicial economy would be best served by dismissing this action and permitting the
21 parties to proceed in the Tennessee case." First Nationwide, 219 F.Supp.2d at 674.

22 The situation is the same here. Shapiro's Complaint in California federal
23 court for declaratory relief on one issue relating to his contractual indemnity obligation involves a
24 sliver of his dispute with Jupiterimages. In contrast, Jupiterimages's Complaint in Connecticut
25 federal court for damages and other equitable relief relating to Shapiro's fraud, negligent
26 misrepresentation, innocent misrepresentation, numerous breaches of contract (including breach of
27 the contractual indemnity obligation), violation of the UCC, unfair trade practices and rescission
28 involves all the disputes between the parties.

2. Where "a putative defendant files a declaratory action whose only purpose is to defeat liability in a subsequent coercive suit, no real value is served by the declaratory judgment except to guarantee to the declaratory plaintiff her choice of forum -- a guarantee that cannot be given consonant with the policy underlying the Declaratory Judgment Act." AmSouth Bank v. Dale, 386 F.3d 763, 788 (6th Cir. 2004) (abuse of discretion for the district court to have entertained the declaratory relief lawsuit where a coercive lawsuit involving the same issue was pending); Nucor Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V., 28 F.3d 572, 577 (7th Cir. 1994) ("[A] suit for declaratory judgment aimed solely at wresting the choice of forum from the 'natural' plaintiff will normally be dismissed and the case allowed to proceed in the usual way."); Pakideh v. Ahadi, 99 F. Supp. 2d 805, 807-09 (E.D. Mich. 2000) (dismissing anticipatory breach of contract declaratory judgment action in favor of coercive action pending in other federal district court after removal); Oce-Office Systems, Inc. v. Eastman Kodak Co., 828 F.Supp. 37, 39 (N.D. Ill. 1993) (declaratory judgment actions should be dismissed where there is another lawsuit seeking coercive relief -- damages -- involving the same issue).

Shapiro's Complaint in this Court seeks only declaratory relief regarding his liability for his indemnity obligation under the Agreement. Jupiterimages's Complaint in Connecticut federal court seeks damages for Shapiro's breach of his indemnity obligation under the Agreement (and other relief). Accordingly, this declaratory relief Complaint should be dismissed.

3. Declaratory judgment actions "are disfavored ... when they are filed in anticipation of another lawsuit, in order to obtain a more favorable forum or procedural posture." First Nationwide Mortgage Corp. v. FISI Madison, LLC, 219 F.Supp.2d 669, 673 (D. Md. 2002); AmSouth Bank v. Dale, 386 F.3d 763, 788 (6th Cir. 2004) ("Courts take a dim view of declaratory plaintiffs who file their suits mere days or weeks before the coercive suits filed by a 'natural plaintiff' and who seem to have done so for the purpose of acquiring a favorable forum. Allowing declaratory actions in these situations can deter settlement negotiations and encourage races to the courthouse, as potential plaintiffs must file before approaching defendants for settlement negotiations, under pain of a declaratory suit."; held, abuse of discretion for the district court to have entertained the declaratory relief lawsuit).

1 As noted above, in First Nationwide, a mortgage company brought a
2 declaratory relief action against a financial marketing company in Maryland state court before the
3 marketing company filed its own breach of contract claim against mortgage company in Tennessee
4 federal court. The Maryland federal court dismissed the Complaint, containing one claim for
5 declaratory relief, because it was filed in anticipation of another lawsuit or to obtain a more
6 favorable forum or procedural posture.

7 Here, Shapiro filed a check-the-boxes Complaint, containing one claim for
8 declaratory relief, in California in a stated attempt to avoid being sued by Jupiterimages in
9 Connecticut federal court for damages and other appropriate equitable relief. In fact, shortly after
10 Shapiro filed this Complaint, Jupiterimages sued Shapiro in Connecticut federal court for such
11 relief. See Request for Judicial Notice.

12 There is no reason that a California court should retain this case. Shapiro
13 seeks a declaratory judgment regarding his indemnity obligation under the Agreement. The
14 Agreement provides that it is governed by New York (not California) law.

15 Finally, it is irrelevant that Shapiro sued Jupiterimages in California and
16 Jupiterimages used Shapiro in Connecticut. "From society's point of view it is essentially irrelevant
17 which one [of the parties] bears the expense and inconvenience of litigating in a distant forum-
18 someone must'." Budget Rent A Car Corp. v. Miljack, Inc., 760 F. Supp. 135, 136 (D. Ill. 1991).

19
20 IV.

21 CONCLUSION

22
23 Jupiterimages's motion to dismiss Shapiro's Complaint in this Court should be
24 granted.

25 First, Shapiro's check-the-boxes Complaint for a declaratory judgment fails to plead
26 any facts showing that Shapiro is entitled to relief. It is deficient under the new United States
27 Supreme Court Twombly case.

28 Second, this Court should exercise its discretion and dismiss Shapiro's declaratory

1 relief Complaint for three independent reasons. Declaratory relief is inappropriate because
2 (a) Shapiro's Complaint will not resolve all of the disputes between the parties; (b) Jupiterimages
3 has sued Shapiro for coercive relief in Connecticut federal court; and (c) Shapiro's Complaint was
4 filed in a stated attempt to obtain a more favorable forum. In the alternative, the Court should stay
5 Shapiro's Complaint in this Court.

6 DATED: November 6, 2007

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